

DENNIS A. BARLOW, CITY ATTORNEY
(SBN 63849)
CAROL A. HUMISTON, SR. ASST. CITY ATTY.
(SBN 115592)
275 East Olive Avenue
P. O. Box 6459
Burbank, CA 91510
Tel: (818) 238-5707 Fax: (818) 238-5724

KRISTIN A. PELLETIER (SBN 155378)
E-mail: kpelletier@bwslaw.com
ROBERT J. TYSON (SBN 187311)
E-mail: rtyson@bwslaw.com
BURKE, WILLIAMS & SORENSSEN, LLP
444 S. Flower Street, 24th Floor
Los Angeles, CA 90071
Tel: 213-236-0600 Fax: 213-236-2700

Attorneys for Defendant
City of Burbank

SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF LOS ANGELES

WILLIAM TAYLOR,

Plaintiff,

v.

CITY OF BURBANK and DOES 1
through 100, inclusive,,

Defendants.

Case No. BC 422252

DEFENDANT CITY OF BURBANK'S
OPPOSING SEPARATE STATEMENT OF
FORM INTERROGATORIES AND
RESPONSES IN PLAINTIFF'S MOTION TO
COMPEL

Date: April 22, 2010
Time: 8:30 a.m.
Dept.: 50

Defendant City of Burbank ("City") hereby submits its Opposing Separate Statement of
Form Interrogatories and Responses in Plaintiff's Motion to Compel as follows:

FORM INTERROGATORY NO. 201.3:

Were there any other ADVERSE EMPLOYMENT ACTIONS, including (the asking party
should list the ADVERSE EMPLOYMENT ACTIONS): DEMOTION TO CAPTAIN If so, for
each action, provide the following:

(a) all reasons for each ADVERSE EMPLOYMENT ACTION;

- 1 -

4/8

(b) the name, ADDRESS, and telephone number of each PERSON who participated in making each ADVERSE EMPLOYMENT ACTION decision;

(c) the name, ADDRESS, and telephone number of each PERSON who provided any information relied upon in making each ADVERSE EMPLOYMENT ACTION decision; and

(d) the identity of all DOCUMENTS relied upon in making each ADVERSE EMPLOYMENT ACTION decision.

RESPONSE TO FORM INTERROGATORY NO. 201.3:

City objects to this interrogatory on the grounds that it is misleading and assumes facts in listing a "demotion to Captain," as at all relevant times, plaintiff was a Captain with the Burbank Police Department and was never demoted to that rank. Moreover, to the extent that plaintiff intends to refer to the elimination of the assignment for a Captain to serve in the capacity of a Deputy Chief, City objects that this is a misleading use of a special definition of the phrase "ADVERSE EMPLOYMENT ACTION" that conflicts with the legal definition of that term. City further objects to this interrogatory to the extent it calls for information which is privileged or otherwise protected from disclosure by Penal Code § 832.7 and Evidence Code §1043. Notwithstanding, but subject to the foregoing objections, City responds as follows on information and belief:

No. There was no Adverse Employment Action against plaintiff, nor was plaintiff demoted to Captain.

To the extent that this interrogatory is intended to simply ask about the elimination of the assignment for a Captain to serve in the capacity of Deputy Chief, City responds as follows:

(a-b) Plaintiff was not demoted from Deputy Chief to Captain. At all relevant times, plaintiff has held the position of Captain. There is no Deputy Chief position or classification in the Burbank Police Department. The Chief of Police has been authorized to designate one of his captains to serve an assignment in the capacity of a Deputy Police Chief. Plaintiff, as a captain, served in that assigned capacity from approximately August 2007 until approximately May 2009. The captain serving in the assigned capacity of Deputy Police Chief was tasked with day-to-day oversight of the Department's operations and to train and mentor new Captains. This assignment

1 was created under a previous administration.

2 In May 2009, Chief of Police Tim Stehr decided to restructure the Police Department. He
3 did not believe that there was a pressing need for the role of the Captain serving in the capacity of
4 Deputy Chief, and he wanted to have more direct control and contact within the Department.
5 Therefore, he eliminated the assignment of having a Captain serve in the capacity of Deputy
6 Police Chief and reassigned plaintiff as the Captain in command of the Investigations Division.

7 Part of Chief Stehr's decision to restructure was based upon a loss of confidence in
8 plaintiff's ability to fulfill the tasks given to the Captain with the Deputy Chief assignment. The
9 most serious contributing factor was that Chief Stehr had received allegations of impropriety
10 concerning plaintiff, including that plaintiff had improperly interfered in an attempted to
11 influence an internal investigation. As the Captain with the Deputy Chief assignment, plaintiff
12 oversaw internal affairs investigations conducted by the Department, which oversight was not
13 appropriate given the allegations against plaintiff.

14 (c) The following witnesses were aware of the reasons for the restructuring: Plaintiff,
15 Chief of Police Tim Stehr and his Command Staff, all members of the Department who received
16 the Chief's Daily Bulletin on the restructuring, Elizabeth J. Gibbons, City Manager Mike Flad.
17 Witness information gathered or generated during the investigation into alleged improprieties by
18 plaintiff, which is ongoing and as such remains confidential and privileged, will be provided
19 when and if they are discoverable.

20 (d) The following documents relate to the restructuring: May 14, 2009 and letter from
21 Juli C. Scott to Elizabeth J. Gibbons and documents referred to therein; Burbank Police Daily
22 Bulletin dated May 4, 2009; City of Burbank, Management Services Division, Personnel Action
23 Forms as to plaintiff, 2007 through 2009, and other miscellaneous Human Resources, personnel
24 and payroll documents. Documents gathered or generated during the investigation into alleged
25 improprieties by plaintiff, which is ongoing and as such remains confidential and privileged, will
26 be provided when and if they are discoverable. (Emphasis added.)

27 **REASON WHY FURTHER RESPONSE SHOULD BE COMPELLED:**

28 It is clear from defendant's response that defendant relies upon "witness information

1 gathered or generated during the investigation into alleged improprieties by plaintiff' in regard to
2 the alleged reasons for its demotion of plaintiff from Deputy Chief to Captain. Indeed, defendant
3 claims that the "the most serious contributing factor" relied upon by defendant in demoting
4 plaintiff was the alleged improprieties of plaintiff which are the subject of these alleged
5 confidential investigations. Defendant cannot have its cake and eat it too. Plaintiff is entitled to
6 be apprised by defendant under oath of all facts, witnesses, and documents that defendant claims
7 allegedly support its contentions in this matter so that plaintiff may rebut same and demonstrate
8 that such alleged reasons are false, pretextual, and a sham, and that the real reason for the
9 demotion and other adverse employment actions taken against plaintiff was retaliation by
10 defendant for plaintiff engaging in activities protected by *Labor Code* Section 1102.5 and FEHA.

11 The *McDonnell Douglas* burden-shifting framework applies in FEHA retaliation cases as
12 well as discrimination cases under both federal and state law. The same framework also applies
13 to retaliation actions premised on violations of *Labor Code* Section 1102.5. *Patten v. Grant Joint*
14 *Union High School District* (2005) 134 Cal.App.4th 1378. Under this framework, a plaintiff is
15 required to establish a prima facie case, which consists of showing that: a) plaintiff engaged in a
16 protected activity; b) the employer subjected plaintiff to an adverse employment action; and c) a
17 causal link exists between the protected activity and the employer's action. *Passantino v.*
18 *Johnson & Johnson Consumer Products, Inc.* (9th Cir. 2000) 212 F.3d 493, 506 (under Title VII);
19 *Yanowitz v. L'Oreal USA, Inc.* (2005) 36 Cal.4th 1028, 1044, 32 Cal.Rptr.3d 436, 446 (under
20 FEHA).

21 The causal link may be based solely on the timing of the relevant actions: "Specifically,
22 when adverse employment decisions are taken within a reasonable period of time after complaints
23 of discrimination have been made, retaliatory intent may be inferred." *Passantino v. Johnson &*
24 *Johnson Consumer Products, Inc.* (9th Cir. 2000) 212 F.3d 493, 507; *Mulhall v. Ashcroft, supra*,
25 287 F.3d at 551; *Mariani-Colon v. Department of Homeland Security ex rel. Chertoff* (1st Cir.
26 2007) 511 F.3d 216, 224 temporal proximity (2 months) between protected activity and discharge
27 sufficient for relatively light burden of establishing prima facie case of retaliation.

28 Thus, the temporal relationship between engaging in the protected activity and a

subsequent adverse employment action is circumstantial evidence of retaliation. *Flait v. North American Watch Company* (1992) 3 Cal.App.4th 467, 478 -479. A series of acts on the part of a defendant employer which proceed in linear fashion from whistleblower disclosures and culminating in adverse employment actions present a triable issue of material fact as to a "causal link" between the protected activity and the adverse employment action. *Patten v. Grant Joint Union High School District, supra*, 134 Cal.App.4th at 1390. Here, the temporal and linear connection is both direct and obvious. Moreover, the relationship between plaintiff's whistleblowing activities and the adverse employment actions is sufficient by itself to provide circumstantial evidence of retaliation sufficient to establish a prima facie case. In *Colarossi v. Coty US Inc.* (2002) 97 Cal.App.4th 1142, the court noted that "suspicious" timing of the employer's actions may provide the circumstantial link needed to infer that an improper purpose accounted for the adverse action. (Id. at 1154.) "The timing of the decision may have been coincidental, but when viewed as part of the mosaic of evidence" plaintiff presented, it will support the causal element of an employment claim. As stated in *Passantino v. Johnson & Johnson Consumer Prods., Inc.* (9th Cir 2000) 212 F.3d 493, 507: "[T]his close timing provides circumstantial evidence of retaliation that is sufficient to create a prima facie case of retaliation." (noting that causation can be inferred from timing alone.); See also, e.g. *Miller v. Fairchild Indus.* (9th Cir. 1989) 885 F. 2d 498, 505.

Once plaintiff has established a prima facie case, the employer must then articulate a legitimate, nonretaliatory reason for each of the adverse employment actions taken. If the defendant is able to do so, then the plaintiff must prove the employer's reason is a pretext. *Stegall v. Citadel Broadcasting Co.* (9th Cir. 2003) 350 F.3d 1061, 1065; *Flait v. North American Watch Corp.* (1992) 3 Cal.App.4th 467, 475-476.

Here, plaintiff engaged in the activities of whistleblowing and reporting and protesting discrimination in the workplace, which activities are protected activities under Labor Code Section 1102.5 and FEHA. Within a short time of engaging in such protected activities plaintiff was demoted from the rank of Deputy Chief to Captain, and has subsequently been placed on administrative leave, based upon alleged reason that plaintiff had engaged in improprieties,

1 including that plaintiff had improperly interfered in and attempted to influence an internal affairs
2 investigation. Plaintiff contends that this alleged reason is false and a sham, and is simply a
3 pretext for retaliating against plaintiff based upon his engaging in the protected activities
4 enumerated above. It is well settled that evidence of dishonest reasons for adverse employment
5 actions proffered by the employer permits a finding of prohibited motive, bias, or intent. *Reeves*
6 *v. Sanderson Plumbing Products, Inc.* (2000) 530 U.S. 133, 148- 149, 120 S. Ct. 2097, 2109; *St.*
7 *Mary's Honor Center v. Hicks* (1993) 509 U.S. 502, 511, 518, 113 S. Ct. at pp. 2749-2750, 2753.

8 Pretext, like a prima facie showing of causation, may be inferred from the timing of the
9 company's termination decision, by the identity of the person making the decision, and by the
10 terminated employee's job performance before termination. *Sada v. Robert F. Kennedy Medical*
11 *Center* (1997) 56 Cal.App.4th 138, 156 - 157; *Flait v. North American Watch Co., supra*, 3
12 Cal.App.4th at 478 - 479; see also, *Miller v. Fairchild Industries, Inc.*, 885 F.2d 498, 505-06 (9th
13 Cir. 1989). These factors support an inference that defendant's stated reason for taking adverse
14 employment actions against plaintiffs were merely a subterfuge for its retaliatory conduct. See,
15 *Sada v. Robert F. Kennedy Medical Center, supra*, 56 Cal.App.4th at 156; *Flait v. North*
16 *American Watch Co., supra*, 3 Cal.App.4th at 480 ("Viewing the evidence in the light most
17 favorable to [the plaintiff], a reasonable trier of fact could conclude that [the defendant's]
18 articulated reasons for terminating [the plaintiffs] employment are not worthy of credence").

19 As such, the information and documents sought by this motion are directly relevant and
20 discoverable in regard to the defendant's alleged reason for the adverse employment actions taken
21 against plaintiff, and are directly relevant and discoverable in regard to plaintiff establishing that
22 the defendant's proffered reason is false and pretextual.

23 **II. THE INFORMATION AND DOCUMENTS REQUESTED ARE NOT**
24 **PRIVILEGED UNDER EVIDENCE CODE SECTION 1040, ET SEQ.**

25 Defendant vaguely claims that the "witness information and documents gathered or
26 generated during the investigation into alleged improprieties by plaintiff, which is ongoing and as
27 such remains confidential and privileged". However, during the meet and confer process in
28 regard to this motion, defendant cited only a single case, *County of Orange v. Superior Court*

1 (2000) 79 Cal.App.4th 759, in support of its position that the information and documents sought
2 are confidential. The County of Orange case is readily distinguishable, and does not support
3 defendant withholding the information and documents sought under the facts of this case.

4 In the County of Orange case, the plaintiffs sought to obtain the files regarding an on-
5 going criminal homicide investigation regarding the murder of a two year old boy in which the
6 plaintiffs had been identified as two of the primary suspects. The court held as follows:

7 "We conclude on the record before us that the public interest in solving C. T.
8 Turner's homicide and bringing the perpetrator(s) to justice outweighed the Wus'
9 interest in obtaining the discovery sought, at least at the time this matter was
10 considered below. We recognize the rather arbitrary nature of this conclusion, but
11 the order we review was made less than a year after this civil action was filed.
12 (And it is still less than three years since it was filed.) When one reflects that the
13 lives of other children may be at risk with the killer(s) still at large, the important
14 interests in vindicating wronged plaintiffs and clearing dockets do not seem quite
15 so important. Consequently, we find the superior court abused its discretion in
16 ordering production of the investigative file to the Wus' attorney. And,
17 parenthetically, we think that most reasonable parents in the Wus' position would
18 concur that the interest in apprehending a child's killer must continue to take
19 priority over any civil action of theirs. 79 Cal.App.4th 759, 767 - 768.

20 Here, there is no unsolved homicide of a child that is being investigated by the defendant
21 in which plaintiff is a suspect. Indeed, there is no criminal investigation of any kind being
22 conducted by the defendant in which plaintiff is a suspect. At best, defendant claims to be
23 investigating alleged violations of its own internal policies regarding the conducting of internal
24 affairs investigations. Defendant cannot possibly cite to any public interest in maintaining the
25 confidentiality of the information and documents at issue that approaches in any way the
26 magnitude of the public interest in apprehending the murderer of a two year old boy. Indeed,
27 exactly the opposite is true - the public interest in assuring that law enforcement officials such a
28 plaintiff, the former Deputy Chief of the defendant's own police department, be free to report
wrongdoing and discrimination by other members of his police department without fear of
retaliation, clearly outweighs any alleged confidentiality interests of the defendant. Here, the
public interest overwhelmingly supports that plaintiff be provided with all of the information and
documents necessary to rebut defendant's specious and retaliatory claims of misconduct by
plaintiff, and to protect plaintiffs statutory rights to report the misconduct of defendant and its

employees.

III. PLAINTIFF AND HIS COUNSEL SHOULD BE PROVIDED THE INTERNAL AFFAIRS STATEMENTS AND OTHER DOCUMENTS REGARDING THE INCIDENTS AT ISSUE IN ORDER TO REBUT DEFENDANT'S ALLEGED REASON FOR TAKING ADVERSE ACTIONS AGAINST PLAINTIFF, TO PREPARE FOR DEPOSITIONS AND TRIAL, AND TO BE ABLE TO IMPEACH THE TESTIMONY AND REFRESH THE RECOLLECTIONS OF WITNESSES, AS HAS BEEN SPECIFICALLY FOUND PROPER IN THE *HAGGERTY v. SUPERIOR COURT* CASE

In *Haggerty v. Superior Court* (2004) 117 Cal.App.4th 1079, 1089, the court specifically held that disclosure pursuant to the Pitchess procedure of internal affairs investigation reports and other investigative materials regarding the incident at issue in the civil case against a deputy sheriff, including internal affairs interviews, transcripts, and other data, was proper. Here, similarly, the Court should order the production of all relevant reports, investigative materials, interviews, transcripts, and other data regarding the investigation and disposition of any complaints of misconduct allegedly involving plaintiff.

Here, as in *Haggerty v. Superior Court, supra*, 17 Cal.App.4th at 1089-1091, the facts gleaned from the internal investigations at issue are directly relevant to the matters at issue in the lawsuit. Moreover, as in *Haggerty*, the requested discovery is important, not only for determining the events that occurred during the incidents, but also for plaintiffs counsel to prepare effective cross-examination of defense witnesses, including to impeach witnesses whose testimony at trial differs from statements made to the investigating officers and/or to refresh the recollections of these witnesses. (See *People v. Hustead* (1999) 74 Cal.App.4th 410, 417; see also, *People v. Memro, supra*, 38 Cal.3d at 677 ["one legitimate goal of [*Pitchess*] discovery is to obtain information 'for possible use to impeach or cross-examine an adverse witness.']. See also, *Garden Grove Police Department v. Superior Court, supra*, 89 Cal.App.4th at 433.

Plaintiff is therefore entitled to the requested information not only to use as substantive evidence to establish that defendant's alleged reasons for the adverse employment actions at issue are pretextual, but also to use to impeach the testimony and/or refresh the recollections of defense and other witnesses. As in *Haggerty*, the investigations at issue concern the very incidents that

1 are the subject of the civil claim. Additionally, as in *Haggerty*, the privacy concerns of defendant
2 and its employees are diminished because they are the persons and/or entities whose conduct is at
3 issue in the litigation, and the requested internal investigation records concern their actions that
4 are alleged to be wrongful and will be fully litigated at trial.

5 Because of the direct relevance of the information, courts have recognized that the law
6 enforcement records of the investigations of the matters at issue in the case are discoverable and
7 have never imposed any special limitations on this disclosure if the requested discovery otherwise
8 meets the statutory criteria. (See *Robinson v. Superior Court* (1978) 76 Cal.App.3d 968, 978 -
9 "[a]t statements made by percipient witnesses and witnesses ... related to the incident in question
10 ... are discoverable under the standards set forth in *Pitchess*"; see also *People v. Alexander* (1983)
11 140 Cal.App.3d 647, 659, disapproved on another point in *People v. Swain* (1996) 12 Cal.4th
12 593.

13 Further, the *Haggerty* court also rejected the contention that the disclosure of relevant
14 internal affairs records would have a chilling effect on every law enforcement agency's ability to
15 conduct an uninhibited, thorough and candid analysis of a complaint, finding such concerns
16 speculative. The court noted that the question of whether police investigation records are
17 discoverable has been unequivocally answered in the affirmative by the Legislature in enacting
18 the *Pitchess* statutory scheme, and that the *Pitchess* "legislation was intended to balance the need
19 of criminal defendants [and civil litigants] to relevant information and the legitimate concerns for
20 confidentiality of police personnel records." *People v. Breaux* (1991) 1 Cal.4th 281, 312. The
21 court held that in balancing these interests, the Legislature made a decision that relevant evidence
22 contained in a personnel file, including internal investigation records and reports, should be
23 disclosed upon a proper showing of materiality and relevance, and did not provide any blanket
24 exceptions to the discoverability of such reports, particularly in the civil context. *Haggerty v.*
25 *Superior Court, supra*, 17 Cal.App.4th at 1091-1092.

26 Here, a plausible foundation exists to conclude that plaintiff was subjected to retaliation
27 by defendant for engaging in activities protected by *Labor Code* Section 1102.5 and FEHA. The
28 information and documents sought are directly relevant and material to plaintiff's contentions that

1 the reason given for the retaliatory actions by defendant are false, a sham, and simply a pretext for
2 retaliation. Indeed, defendant and its counsel have conceded that such information and documents
3 are relevant by repeatedly referencing same throughout defendant's sworn discovery responses in
4 this matter. As such, the records pertaining to the investigations by defendant of the allegations
5 made against plaintiff are relevant and material. The information and documents sought should
6 be disclosed to plaintiff. In the alternative, such information and documents should be examined
7 by the court *in camera*, and all evidence relevant to plaintiff's claims should be turned over to
8 plaintiff's counsel.

9 **IV. THE INFORMATION AND DOCUMENTS REQUESTED ARE NOT**
10 **PRIVILEGED UNDER THE ATTORNEY-CLIENT PRIVILEGE OR THE**
11 **ATTORNEY WORK PRODUCT DOCTRINE**

12 An employer waives the attorney-client and attorney work product privileges regarding
13 the contents of an investigation by raising the fact of the investigation as a defense. *Wellpoint*
14 *Health Networks, Inc. v. Sup.Ct.* (McCombs) (1997) 59 Cal.App.4th 110, 122-124, 128 -
15 defendants waived attorney-client privilege regarding contents investigation of plaintiffs sexual
16 harassment claim by raising fact of investigation as defense. (See also, *McGrath v. Nassau*
17 *County Health Care Corp.* (ED NY 2001) 204 F.R.D. 240, 244. Where the employer relies on
18 the investigator's report to show that it conducted an adequate investigation of charges, that report
19 will be subject to pretrial discovery, even if the investigator was an attorney. *Wellpoint Health*
20 *Networks, Inc. v. Sup.Ct.* (McCombs) (1997) 59 Cal.App.4th 110 - employer's pleading adequacy
21 of its investigation as defense waives attorney-client privilege and work product doctrine; *Walker*
22 *v. Contra Costa County* (ND CA 2005) 227 F.R.D. 529, 535 - pleading adequate investigation of
23 harassment complaint as affirmative defense waived attorney-client privilege, self-evaluative
24 privilege and attorney work product protection.

25 Further, a report that simply summarizes the investigation or presents factual conclusions
26 for management action, and does not contain confidential legal advice, is not privileged from
27 discovery even if it was prepared by an attorney. *Wellpoint Health Networks, Inc. v. Sup.Ct.*
28 (McCombs) (1997) 59 Cal.App.4th 110, 121-122.

Here, the investigation at issue is being conducted by an investigator named James

Gardiner, and not by any attorney. Defendant is specifically relying upon the information and documents generated by this investigation to support its denials and alleged defenses in this matter. As such, even if the attorney-client and/or attorney work product privileges applied to this investigation (which they do not), such privileges have been waived by defendant.

V. PLAINTIFF IS ENTITLED TO DISCLOSURE OF THE REQUESTED DOCUMENTS

A. Peace Officer Personnel Records Are Expressly Discoverable Pursuant to Evidence Code §1043(a) and 1045(a)

Evidence Code §1043 and 1045(a) provide that if the personnel records and information contained therein are relevant to the subject matter of the litigation, upon motion by the party seeking the records and information there is a right of access to the records of complaints, investigations of complaints, and discipline imposed as a result of such investigations.

Evidence Code §1045(a) provides as follows:

“(a) Nothing in this article shall be construed to affect the right of access to records of complaints, or investigations of complaints, or discipline imposed as a result of such investigations, concerning an event or transaction in which the peace officer participated, or which he perceived, and the manner in which he performed his duties, provided that such information is relevant to the subject matter involved in the pending litigation. (Emphasis added)

This subdivision is “expansive.” *Fletcher v. Superior Court* (2002) 100 Cal.App.4th 386, 399. In particular, “relevant information” under *Evidence Code* Section 1045 is not limited to facts that may be admissible at trial, but may include facts that could lead to the discovery of admissible evidence. *People v. Memro, supra*, 38 Cal.3d at 681-682; *People v. Hustead, supra*, 74 Cal.App.4th at 423.

Under the statutory scheme, a party seeking discovery of a peace officer’s personnel records need only file a written motion describing the type of records sought, supported by “[a]ffidavits showing good cause for the discovery..., setting forth the materiality thereof to the subject matter involved in the pending litigation and stating upon reasonable belief that the governmental agency identified has the records or information from the records.” (*Evidence Code* § 1043 (b)(3).) This initial burden is a “relatively relaxed standard.” *City of Santa Cruz v. Municipal Court* (1989) 49 Cal.3d 74, 84. Information is material as defined by *Evidence Code* §

1 1043 (b)(3) if it 'will facilitate the ascertainment of the facts and a fair trial.' "[A] declaration by
2 counsel on information and belief is sufficient to state facts to satisfy the 'materiality' component
3 of that section." *Abatti v. Superior Court, supra*, 112 Cal.App.4th at 51.

4 In *Santa Cruz v. Municipal Court, supra*, 49 Cal.3d 88 - 89, the California Supreme Court
5 held that personal knowledge is not required by *Evidence Code* 1043(b) and that an affidavit on
6 information and belief is sufficient. The Court found that in the context of Pitchess motions, the
7 Legislature had expressly considered and rejected a requirement of personal knowledge. The
8 Court held that the legislative history, the case law background, and the statutory language all
9 point to the same conclusion: the "materiality" component of *Evidence Code* § 1043(b) may be
10 satisfied by affidavits based on information and belief, (49 Cal.3d at 89.)

11 In *Abatti v. Superior Court, supra*, 112 Cal.App.4th 39, the *Pitchess* motion contained an
12 affidavit of counsel that related statements from other officers that the former officer had been
13 asked to leave, and had been the subject of other complaints, and was labeled a "liability"
14 problem for the department. *Id.* at 46-47. The court considered counsel's affidavit sufficient,
15 even though it merely averred the contents of the counseling memos rather than stating with
16 specificity the evidence which was contained therein. The court reasoned that to require such
17 "specificity" in the Pitchess process would place the proponent of the motion in a "Catch-22"
18 position of having to allege with particularity the very information he or she is seeking. *Id.* at 47,
19 fn. 7.

20 **VI. THE INFORMATION AND DOCUMENTS SOUGHT ARE RELEVANT AND**
21 **DISCOVERABLE, AND RELATE DIRECTLY TO DISPUTED ISSUES IN THIS**
22 **CASE**

23 Relevance is defined by *Evidence Code* Section 210, which provides that:
24 "Relevant evidence" means evidence, including evidence relevant to the credibility
25 of a witness or hearsay declarant, having any tendency in reason to prove or
26 disprove any disputed fact that is of consequence to the determination of the
27 action."

28 Relevance to the subject matter is to be broadly construed and is not limited to relevance
to the narrow issues of the case. *Greyhound Corporation v. Superior Court* (1961) 56 Cal.2d
355, 378, 390. As set forth above, in the *Pitchess* motion context, a declaration by counsel on

1 information and belief is sufficient to state facts to satisfy the 'materiality' component of
2 *Evidence Code* § 1043(a). *Abatti v. Superior Court* (2003) 112 Cal.App.4th 39, 51; *Haggerty v.*
3 *Superior Court, supra*, 17 Cal.App.4th at 1086.

4 Here, there is a reasonable basis to conclude the internal investigation files at issue contain
5 information that are relevant and material to the lawsuit. (See *Robinson v. Superior Court, supra*,
6 76 Cal.App.3d at 977 (noting that the relevancy of an investigation of the incident that is the basis
7 for the lawsuit is "self-evident"). Indeed, the records requested involve the investigations of the
8 very matters which are the basis of defendant's alleged defenses in this matter, and are therefore
9 directly relevant to the allegations in this case. Further, such documents, including the statements
10 taken of witnesses during the internal investigations by defendant, are evidence relevant to the
11 credibility of the witnesses.

12 It is unfair, unjust, and inequitable for defendant and its counsel to have access to this
13 information and materials, to rely upon same in denying plaintiffs allegations, and to utilize same
14 to prepare for deposition and trial, and to deny plaintiffs counsel access to the same information
15 and documents. *Evidence Code* Sections 1043 and 1045 are not intended to provide public
16 entities and law enforcement agencies with an unfair advantage in defending civil actions. A
17 public entity cannot invoke these code sections to withhold evidence relevant to the case. *Garden*
18 *Grove Police Dept. v. Superior Court* (2001) 89 Cal.App.4th 430, 433, c.f. *People v. Memro*
19 (1985) 38 Cal.3d 658, 679. As the court stated in *Gill v. Manuel* (9th Cir. 1973) 488 F.2d 799,
20 803, *Evidence Code* §1040 is not "intended to provide a shield behind which law enforcement
21 personnel may seek refuge for possible wrongdoings."

22 **VII. Plaintiff Has Demonstrated Good Cause For The Production of the Requested**
23 **Information and Documents**

24 The declaration submitted herewith contains facts that establish a plausible foundation to
25 conclude that defendant engaged in retaliation against plaintiff. The conduct by plaintiff which
26 defendant contends supports its retaliatory actions against plaintiff was the subject of one or more
27 internal affairs investigations by the defendant. Plaintiff contends that the allegations by
28 defendant of misconduct by plaintiff are unfounded, and the information and documents

1 regarding defendant's investigation of such alleged misconduct will demonstrate that the
2 allegations are specious. As such, the facts regarding these matters, which are of consequence to
3 the determination of this action, are disputed between the parties, and the requested information,
4 documents, and items are relevant and discoverable in regard to such disputed issues.

5 **REASON WHY FURTHER RESPONSE SHOULD NOT BE COMPELLED:**

6 **A. The City Will Amend Its Response In Light Of The Completion Of The**
7 **Pending 2009 IA Investigation**

8 This discovery request asked for information that was the subject of a then-pending
9 internal investigation. The City accordingly and appropriately declined to provide this
10 information until the investigation was complete. The objection to producing/providing
11 information from an on-going investigation was both well taken and appropriate, particularly in
12 the absence of a motion for such information under *Evidence Code* § 1043.

13 *Evidence Code* § 1043 is the exclusive method for obtaining not just police officer
14 personnel records, but also the information from such records. *Davis v. City of Sacramento*
15 (1994) 24 Cal.App.4th 393, 401, fn. 2 (citing *Hackett v. Sup. Ct.* (1993) 13 Cal.App.4th 96, 99). It
16 would serve no purpose if such privileged information could be obtained by other means, such as
17 by written or oral questioning of the officers or department. *Id.* In addition, ongoing police
18 investigations and all of the information contained therein, are subject to their own layer of
19 confidentiality. *County of Orange v. Sup. Ct.* (2000) 79 Cal.App.4th 759, 765. *County of Orange*
20 relied extensively upon *Williams v. Superior Court* (1993) 5 Cal.4th 337, 355, in which the
21 California Supreme Court held that a Sheriff Department's internal disciplinary investigation was
22 protected from disclosure under the Public Records Act while pending, and beyond. Assessing
23 that holding, the *County of Orange* court held that notwithstanding that the Public Records Act
24 does not apply to civil discovery, its express exemption of police investigative files (as noted in a
25 case involving an internal disciplinary investigation) "reinforces the view that such files are
26 confidential in nature." *County of Orange, supra*, 79 Cal.App.4th at 765.

27 As indicated in defense counsel's April 2, 2010 letter, in light of the completion of the
28

1 internal investigation and its provision to plaintiff as part of the disciplinary process, the City has
2 agreed to provide amended responses to plaintiff's discovery requests, including the discovery
3 responses at issue herein. [Pelletier Decl., ¶ 7, Ex. C.] The City is in the process of preparing and
4 will serve these responses on or before the date of the hearing on plaintiff's Motion. [Id.] As
5 such, the Motion, as a motion to compel, should be considered moot as to items l-n in the Notice
6 of Motion.

7 **B. In Fact, Further Documents Have Already Been Produced**

8 In fact, however, The City has already provided plaintiff and his counsel with the
9 documentation of the now completed 2009 IA Investigation of him as part of an administrative
10 process. [Varner Decl., ¶ 5.] This has provided plaintiff with the information requested in the
11 Notice of Motion subsections a (no. 2), b, d, f, g, h, and i. Plaintiff's counsel may attempt to
12 obfuscate the issue by claiming that such production was incomplete. However, such production
13 included the complete report of the 2009 IA Investigation as to plaintiff and the underlying
14 information uncovered in the investigation of plaintiff. [Varner Decl., ¶¶ 5-6.] The City also
15 produced the records of the underlying 2008 IA investigation, No. 4-26-08-1, item no. c in the
16 Notice of Motion. [Id.] The only other material in the City's possession would be documents
17 from investigations of other BPD officers in the 2009 IA Investigation that were not part of or
18 used in the investigation of plaintiff. As discussed in the opposition, that information was not
19 requested in this Motion, nor was a proper showing made therefore. Nor is that information
20 related to this discovery request about information pertaining to the purported "demotion" of
21 plaintiff. Accordingly, the Motion should be denied as moot as to all records of the 2008 IA
22 Investigation and 2009 IA Investigation which have already been provided to plaintiff.

23 For all of the above reasons, no further responses should be compelled.

24 **FORM INTERROGATORY NO. 201.4:**

25 Was the TERMINATION or any other ADVERSE EMPLOYMENT ACTIONS referred
26 to in Interrogatories 201.1 through 201.3 based in whole or in part on the EMPLOYEE'S job
27 performance? If so, for each action:

28 (a) identify the ADVERSE EMPLOYMENT ACTION;

() ()
1 (b) identify the EMPLOYEE'S specific job performance that played a role in that
2 ADVERSE EMPLOYMENT ACTION;

3 (c) identify any rules, guidelines, policies, or procedures that were used to evaluate the
4 EMPLOYEE'S specific job performance;

5 (d) state the names, ADDRESSES, and telephone numbers of all PERSONS who had
6 responsibility for evaluating the specific job performance of the EMPLOYEE;

7 (e) state the names, ADDRESSES, and telephone numbers of all PERSONS who have
8 knowledge of the EMPLOYEE'S specific job performance that played a role in that ADVERSE
9 EMPLOYMENT ACTION; and

10 (f) describe all warnings given with respect to the EMPLOYEE'S specific job
11 performance.

12 **RESPONSE TO FORM INTERROGATORY NO. 201.4:**

13 City objects to this interrogatory on the grounds that it is misleading and assumes facts in
14 listing a "demotion to Captain," as at all relevant times, plaintiff was a Captain with the Burbank
15 Police Department, and was never demoted to that rank. Moreover, to the extent that plaintiff
16 intends to refer to the elimination of the assignment for a Captain to serve in the capacity of a
17 Deputy Chief, City objects that this is a misleading use of a special definition of the phrase
18 "ADVERSE EMPLOYMENT ACTION" that conflicts with the legal definition of that term.
19 Notwithstanding, but subject to the foregoing, City responds as follows on information and belief:

20 There was no Adverse Employment Action against plaintiff, nor was plaintiff demoted to
21 Captain.

22 To the extent that this interrogatory is intended to simply ask about the elimination of the
23 assignment for a Captain to serve in the capacity of Deputy Chief, City responds as follows:

24 (a) There was no adverse employment action.

25 (b) In May 2009, Chief of Police Tim Stehr decided to restructure the Police
26 Department. He did not believe that there was a pressing need for the role of the Captain serving
27 in the capacity of Deputy Chief, and Chief Stehr wanted to have more direct control and contact
28 within the Department. Therefore, he eliminated the assignment of having a Captain serve in the

1 capacity of Deputy Police Chief and reassigned plaintiff as the Captain in command of the
2 Investigations Division.

3 Part of Chief Stehr's decision to restructure was based upon a loss of confidence in
4 plaintiff's ability to fulfill the tasks given to the Captain with the Deputy Chief assignment. The
5 most serious contributing factor was that Chief Stehr had received allegations of impropriety
6 concerning plaintiff, including that plaintiff had improperly interfered in an attempted to
7 influence an internal investigation. As the Captain with the Deputy Chief assignment, plaintiff
8 oversaw internal affairs investigations conducted by the Department, which oversight was not
9 appropriate given the allegations against plaintiff.

10 (c) City personnel rules, administrative rules and regulations, civil service rules,
11 Municipal Code, and resolutions pertaining to wages and compensation.

12 (d) Tim Stehr

13 (e) The following witnesses were aware of the reasons for the restructuring: Plaintiff,
14 Chief of Police Tim Stehr and his Command Staff, all members of the Department who received
15 the Chief's Daily Bulletin on the restructuring, Elizabeth J. Gibbons, City Manager Mike Flad.
16 Witness information gathered or generated during the investigation into alleged improprieties by
17 plaintiff, which is ongoing and as such remains confidential and privileged, will be provided
18 when and if they are discoverable.

19 (f) The following documents relate to the restructuring: May 14, 2009 and letter from
20 Juli C. Scott to Elizabeth J. Gibbons and documents referred to therein; Burbank Police Daily
21 Bulletin dated May 4, 2009; City of Burbank, Management Services Division, Personnel Action
22 Forms as to plaintiff, 2007 through 2009, and other miscellaneous Human Resources, personnel
23 and payroll documents. Documents gathered or generated during the investigation into alleged
24 improprieties by plaintiff, which is ongoing and as such remains confidential and privileged, will
25 be provided when and if they are discoverable. (Emphasis added.)

26 **REASON WHY FURTHER RESPONSE SHOULD BE COMPELLED:**

27 It is clear from defendant's response that defendant relies upon "witness information and
28 documents gathered or generated during the investigation into alleged improprieties by plaintiff"

in regard to the alleged reasons for its demotion of plaintiff from Deputy Chief to Captain. Indeed, defendant claims that the "the most serious contributing factor" relied upon by defendant in demoting plaintiff was the alleged improprieties of plaintiff which are the subject of these alleged confidential investigations. Defendant cannot have its cake and eat it too. Plaintiff is entitled to be apprised by defendant under oath of all facts, witnesses, and documents that defendant claims allegedly support its contentions in this matter so that plaintiff may rebut same and demonstrate that such alleged reasons are false, pretextual, and a sham, and that the real reason for the demotion and other adverse employment actions taken against plaintiff was retaliation by defendant for plaintiff engaging in activities protected by *Labor Code* Section 1102.5 and FEHA.

Plaintiff contends that none of the requested information and documents are confidential and protected from discovery, under Penal Code §832.7, Evidence Code §1043, the attorney-client privilege, the attorney work-product doctrine, or any other privilege. Plaintiff hereby incorporates by reference all of the authorities and argument regarding the relevance, discoverability, and reasons why such information and documents are not privileged as set forth above in regard to Form Interrogatory No. 201.3 as though set forth here in extenso.

REASON WHY FURTHER RESPONSE SHOULD NOT BE COMPELLED:

A. The City Will Amend Its Response In Light Of The Completion Of The Pending 2009 IA Investigation

This discovery request asked for information that was the subject of a then-pending internal investigation. The City accordingly and appropriately declined to provide this information until the investigation was complete. The objection to producing/providing information from an on-going investigation was both well taken and appropriate, particularly in the absence of a motion for such information under *Evidence Code* § 1043.

Evidence Code § 1043 is the exclusive method for obtaining not just police officer personnel records, but also the information from such records. *Davis v. City of Sacramento* (1994) 24 Cal.App.4th 393, 401, fn. 2 (citing *Hackett v. Sup. Ct.* (1993) 13 Cal.App.4th 96, 99). It would serve no purpose if such privileged information could be obtained by other means, such as

by written or oral questioning of the officers or department. *Id.* In addition, ongoing police investigations and all of the information contained therein, are subject to their own layer of confidentiality. *County of Orange v. Sup. Ct.* (2000) 79 Cal.App.4th 759, 765. *County of Orange* relied extensively upon *Williams v. Superior Court* (1993) 5 Cal.4th 337, 355, in which the California Supreme Court held that a Sheriff Department's internal disciplinary investigation was protected from disclosure under the Public Records Act while pending, and beyond. Assessing that holding, the *County of Orange* court held that notwithstanding that the Public Records Act does not apply to civil discovery, its express exemption of police investigative files (as noted in a case involving an internal disciplinary investigation) "reinforces the view that such files are confidential in nature." *County of Orange, supra*, 79 Cal.App.4th at 765.

As indicated in defense counsel's April 2, 2010 letter, in light of the completion of the internal investigation and its provision to plaintiff as part of the disciplinary process, the City has agreed to provide amended responses to plaintiff's discovery requests, including the discovery responses at issue herein. [Pelletier Decl., ¶ 7, Ex. C.] The City is in the process of preparing and will serve these responses on or before the date of the hearing on plaintiff's Motion. [Id.] As such, the Motion, as a motion to compel, should be considered moot as to items l-n in the Notice of Motion.

B. In Fact, Further Documents Have Already Been Produced

In fact, however, The City has already provided plaintiff and his counsel with the documentation of the now completed 2009 IA Investigation of him as part of an administrative process. [Varner Decl., ¶ 5.] This has provided plaintiff with the information requested in the Notice of Motion subsections a (no. 2), b, d, f, g, h, and i. Plaintiff's counsel may attempt to obfuscate the issue by claiming that such production was incomplete. However, such production included the complete report of the 2009 IA Investigation as to plaintiff and the underlying information uncovered in the investigation of plaintiff. [Varner Decl., ¶¶ 5-6.] The City also produced the records of the underlying 2008 IA investigation, No. 4-26-08-1, item no. c in the Notice of Motion. [Id.] The only other material in the City's possession would be documents from investigations of other BPD officers in the 2009 IA Investigation that were not part of or

used in the investigation of plaintiff. As discussed in the opposition, that information was not requested in this Motion, nor was a proper showing made therefore. Nor is that information related to this discovery request about information pertaining to the purported "demotion" of plaintiff. Accordingly, the Motion should be denied as moot as to all records of the 2008 IA Investigation and 2009 IA Investigation which have already been provided to plaintiff.

For all of the above reasons, no further responses should be compelled.

FORM INTERROGATORY NO. 216.1:

Identify each denial of a material allegation and each special or affirmative defense in your PLEADINGS and for each:

- (a) state all facts upon which you base the denial or special or affirmative defense;
- (b) state the names, ADDRESSES, and telephone numbers of all PERSONS who have knowledge of those facts; and
- (c) identify all DOCUMENTS and all other tangible things, that support your denial or special or affirmative defense, and state the name, ADDRESS, and telephone number of the PERSON who has each DOCUMENT.

RESPONSE TO FORM INTERROGATORY NO. 216.1:

City objects to this interrogatory on the grounds that seeks to invade the attorney-client privilege and the attorney work product doctrine and to violate Penal Code §832.7 and *Evidence Code* §1043. Notwithstanding, but subject to the foregoing, City responds as follows on information and belief:

(a) Plaintiff did not complain about discrimination in the Burbank Police Department to either City Manager Mike Flad or Chief of Police Tim Stehr as alleged in the complaint, or in any other manner of which the City is aware prior to describing such allegations as underlying his FEHA and/or government tort claims for retaliation and in the complaint in this action. None of the actions described in plaintiff's Complaint were in retaliation for plaintiff's non-existent alleged complaints of racial discrimination in the Burbank Police Department.

Plaintiff was not demoted from Deputy Chief to Captain. At all relevant times, plaintiff has held the position of Captain. There is no Deputy Chief position or classification in the

1 Burbank Police Department. The Chief of Police has been authorized to designate one of his
2 captains to serve an assignment in the capacity of a Deputy Police Chief. Plaintiff, as a captain,
3 served in that assigned capacity from approximately August 2007 until approximately May 2009.
4 The captain serving in the assigned capacity of Deputy Police Chief was tasked with day-to-day
5 oversight of the Department's operations and to train and mentor new Captains. This assignment
6 was created under a previous administration.

7 In May 2009, Chief of Police Tim Stehr decided to restructure the Police Department. He
8 did not believe that there was a pressing need for the role of the Captain serving in the capacity of
9 Deputy Chief, and he wanted to have more direct control and contact within the Department.
10 Therefore, he eliminated the assignment of having a Captain serve in the capacity of Deputy
11 Police Chief and reassigned plaintiff as the Captain in command of the Investigations Division.

12 Part of Chief Stehr's decision to restructure was based upon a loss of confidence in
13 plaintiff's ability to fulfill the tasks given to the Captain with the Deputy Chief assignment. The
14 most serious contributing factor was that Chief Stehr had received allegations of impropriety
15 concerning plaintiff, including that plaintiff had improperly interfered in an attempted to
16 influence an internal investigation. As the Captain with the Deputy Chief assignment, plaintiff
17 oversaw internal affairs investigations conducted by the Department, which oversight was not
18 appropriate given the allegations against plaintiff.

19 (b) Tim Stehr, Mike Flad and members of the City's Management Services
20 Department area aware of plaintiff's failure to complain of alleged race discrimination. The
21 following witnesses were aware of the reasons for the 2009 restructuring of the Police
22 Department: Plaintiff, Chief of Police Tim Stehr and his Command Staff, all members of the
23 Department who received the Chiefs Daily Bulletin on the restructuring, Elizabeth J. Gibbons,
24 City Manager Mike Flad. Also, internal affairs investigators, as well as complaining and other
25 witnesses in internal affairs investigations may have knowledge relevant hereto, however the
26 identity of such persons is privileged and confidential under Penal Code §832.7 and *Evidence*
27 *Code* §1043, particularly to the extent such investigations remains ongoing.

28 (c) The following documents relate to the restructuring: May 14, 2009 and letter from

1 Juli C. Scott to Elizabeth J. Gibbons and documents referred to therein; Burbank Police Daily
2 Bulletin dated May 4, 2009; City of Burbank, Management Services Division, Personnel Action
3 Forms as to plaintiff, 2007 through 2009, and other miscellaneous Human Resources, personnel
4 and payroll documents. Documents gathered or generated during the investigation into alleged
5 improprieties by plaintiff, which is ongoing and as such remains confidential and privileged, will
6 be provided when and if they are discoverable.

7
8 FIRST AFFIRMATIVE DEFENSE

9 (Failure to State a Cause of Action)

10 This is a legal defense.

11 SECOND AFFIRMATIVE DEFENSE

12 (Good Faith)

13 (a) At all times relevant to plaintiff's claims, the City acted in good faith and dealt
14 reasonably and fairly with plaintiff. Plaintiff did not complain about discrimination in the
15 Burbank Police Department to either City Manager Mike Flad or Chief of Police Tim Stehr as
16 alleged in the complaint, or in any other manner of which the City is aware prior to describing
17 such allegations as underlying his FEHA and/or government tort claims for retaliation and in the
18 complaint in this action. None of the actions described in plaintiff's Complaint were in retaliation
19 for plaintiff's non-existent alleged complaints of racial discrimination in the Burbank Police
20 Department.

21 Plaintiff was not demoted from Deputy Chief to Captain. At all relevant times, plaintiff
22 had held the position of Captain. There is no Deputy Chief position or classification in the
23 Burbank Police Department. The Chief of Police has been authorized to designate one of his
24 captains to serve an assignment in the capacity of a Deputy Police Chief. Plaintiff, as a captain,
25 served in that assigned capacity from approximately August 2007 until approximately May 2009.
26 The captain serving in the assigned capacity of Deputy Police Chief was tasked with day-to-day
27 oversight of the Department's operations and to train and mentor new Captains. This assignment
28 was created under a previous administration.

1 In May 2009, Chief of Police Tim Stehr decided to restructure the Police Department. He
2 did not believe that there was a pressing need for the role of the Captain serving in the capacity of
3 Deputy Chief, and Chief Stehr wanted to have more direct control and contact within the
4 Department. Therefore, he eliminated the assignment of having a Captain serve in the capacity of
5 Deputy Police Chief and reassigned plaintiff as the Captain in command of the Investigations
6 Division.

7 Part of Chief Stehr's decision to restructure was based upon a loss of confidence in
8 plaintiff's ability to fulfill the tasks given to the Captain with the Deputy Chief assignment. The
9 most serious contributing factor was that Chief Stehr had received allegations of Impropriety
10 concerning plaintiff, including that plaintiff had improperly interfered in an attempted to
11 influence an internal investigation. As the Captain with the Deputy Chief assignment, plaintiff
12 oversaw internal affairs investigations conducted by the Department, which oversight was not
13 appropriate given the allegations against plaintiff.

14 (b) Tim Stehr, Mike Flad and members of the City's Management Services
15 Department area aware of plaintiff's failure to complain of alleged race discrimination. The
16 following witnesses were aware of the reasons for the 2009 restructuring of the Police
17 Department: Plaintiff, Chief of Police Tim Stehr and his Command Staff, all members of the
18 Department who received the Chief's Daily Bulletin on the restructuring, Elizabeth J. Gibbons,
19 City Manager Mike Flad. Also, internal affairs investigators, as well as complaining and other
20 witnesses in internal affairs investigations may have knowledge relevant hereto, however the
21 identity of such persons is privileged and confidential under *Penal Code* §832.7 and *Evidence*
22 *Code* §1043, particularly to the extent such investigations remains ongoing.

23 (c) The following documents relate to the restructuring: May 14, 2009 and letter from
24 Juli C. Scott to Elizabeth J. Gibbons and documents referred to therein; Burbank Police Daily
25 Bulletin dated May 4, 2009; City of Burbank, Management Services Division, Personnel Action
26 Forms as to plaintiff, 2007 through 2009, and other miscellaneous Human Resources, personnel
27 and payroll documents. Documents gathered or generated during the investigation into alleged
28 improprieties by plaintiff, which is ongoing and as such remains confidential and privileged, will

1 be provided when and if they are discoverable.

2 THIRD AFFIRMATIVE DEFENSE

3 (Reasonable Response)

4 (a) Plaintiff failed to utilize the internal procedures for reporting complaints of illegal
5 discrimination and/or retaliation. The City has been unable to locate any complaints made prior
6 to the filing of the tort and DFEH claims required as a prerequisite to this action. The City
7 attempted to investigate these claims, but plaintiff, through his counsel, declined to interviewed.
8 The investigations remain open. Discovery is continuing.

9 (b) Tim Stehr, Mike Flad and members of the City's Management Services
10 Department area aware of plaintiff's failure to complain of alleged race discrimination.

11 (c) The letters between the City and plaintiff/his counsel reflect plaintiff's refusal to
12 participate in an interview. These documents are in the possession of plaintiff and his counsel.

13 FOURTH AFFIRMATIVE DEFENSE

14 (Plaintiff's Negligence)

15 The damages allegedly suffered by plaintiff, if any, were directly or proximately caused
16 by the acts, omissions, carelessness, or negligence of plaintiff. As noted above, plaintiff did not
17 complain of discrimination and was not "demoted" to Captain. Information related to allegations
18 of improprieties by plaintiff that is part of an ongoing investigation protected by Penal Code
19 §832.7 and *Evidence Code* §1043 will be provided when and if it is relevant and discoverable.
20 Discovery is continuing.

21 FIFTH AFFIRMATIVE DEFENSE

22 (Negligence to Third Parties)

23 The damages allegedly suffered by plaintiff, if any, were directly or proximately caused
24 by the acts, omissions, carelessness, or negligence of plaintiff and/or third parties with whom he
25 affiliated. As noted above, plaintiff did not complaint of discrimination and was not "demoted"
26 to Captain. Information related to allegations of improprieties by plaintiff or others that is part of
27 an ongoing investigation protected by Penal Code §832.7 and *Evidence Code* §1043 will be
28 provided when and if it is relevant and discoverable. Discovery is continuing.

1 SIXTH AFFIRMATIVE DEFENSE

2 (Exclusive Remedy of Worker's Compensation)

3 (a) This is primarily a legal defense. To the extent that plaintiff's Complaint, or any
4 purported cause of action therein, alleges emotional or physical injury, any recovery is barred by
5 the exclusive remedy provision of the California Workers' Compensation Act, Labor Code §§
6 132a and 3200, et seq. Plaintiff has filed workers' compensation claims, and is currently out on
7 medical leave. Discovery is continuing.

8 (b-c) City's Workers' compensation files and persons listed therein.

9 SEVENTH AFFIRMATIVE DEFENSE

10 (Absence of Ratification)

11 (a) No alleged acts of discrimination or other civil wrongs allegedly committed
12 against plaintiff, if any occurred, were authorized, ratified, or approved by the City or any
13 supervising or managing agent. Plaintiff did not complain about discrimination in the Burbank
14 Police Department to either City Manager Mike Flad or Chief of Police Tim Stehr as alleged in
15 the complaint, or in any other manner of which the City is aware prior to describing such
16 allegations as underlying his FEHA and/or government tort claims for retaliation and in the
17 complaint in this action.

18 Moreover, plaintiff was not demoted from Deputy Chief to Captain. At all relevant times,
19 plaintiff had held the position of Captain. There is no Deputy Chief position or classification in
20 the Burbank Police Department. The Chief of Police has been authorized to designate one of his
21 captains to serve an assignment in the capacity of a Deputy Police Chief. Plaintiff, as a captain,
22 served in that assigned capacity from approximately August 2007 until approximately May 2009.
23 The captain serving in the assigned capacity of Deputy Police Chief was tasked with day-to-day
24 oversight of the Department's operations and to train and mentor new Captains. This assignment
25 was created under a previous administration.

26 In May 2009, Chief of Police Tim Stehr decided to restructure the Police Department. He
27 did not believe that there was a pressing need for the role of the Captain serving in the capacity of
28 Deputy Chief, and Chief Stehr wanted to have more direct control and contact within the

1 Department. Therefore, he eliminated the assignment of having a Captain serve in the capacity of
2 Deputy Police Chief and reassigned plaintiff as the Captain in command of the Investigations
3 Division.

4 Part of Chief Stehr's decision to restructure was based upon a loss of confidence in
5 plaintiff's ability to fulfill the tasks given to the Captain with the Deputy Chief assignment. The
6 most serious contributing factor was that Chief Stehr had received allegations of impropriety
7 concerning plaintiff, including that plaintiff had improperly interfered in an attempted to
8 influence an internal investigation. As the Captain with the Deputy Chief assignment, plaintiff
9 oversaw internal affairs investigations conducted by the Department, which oversight was not
10 appropriate given the allegations against plaintiff.

11 (b) Tim Stehr, Mike Flad and members of the City's Management Services
12 Department area aware of plaintiff's failure to complain of alleged race discrimination.

13 The following witnesses were aware of the reasons for the 2009 restructuring of the Police
14 Department: Plaintiff, Chief of Police Tim Stehr and his Command Staff, all members of the
15 Department who received the Chief's Daily Bulletin on the restructuring, Elizabeth J. Gibbons,
16 City Manager Mike Flad. Also, internal affairs investigators, as well as complaining and other
17 witnesses in internal affairs investigations may have knowledge relevant hereto, however the
18 identity of such persons is privileged and confidential under Penal Code §832.7 and *Evidence*
19 *Code* §1043, particularly to the extent such investigations remains ongoing.

20 (c) The following documents relate to the restructuring: May 14, 2009 and letter from
21 Juli C. Scott to Elizabeth J. Gibbons and documents referred to therein; Burbank Police Daily
22 Bulletin dated May 4, 2009; City of Burbank, Management Services Division, Personnel Action
23 Forms as to plaintiff, 2007 through 2009, and other miscellaneous Human Resources, personnel
24 and payroll documents. Documents gathered or generated during the investigation into alleged
25 improprieties by plaintiff, which is ongoing and as such remains confidential and privileged, will
26 be provided when and if they are discoverable.

27 ///

28 ///

EIGHTH AFFIRMATIVE DEFENSE

(Business Necessity)

(a) Plaintiff did not complain about discrimination in the Burbank Police Department to either City Manager Mike Flad or Chief of Police Tim Stehr as alleged in the complaint, or in any other manner of which the City is aware prior to describing such allegations as underlying his FEHA and/or government tort claims for retaliation and in the complaint in this action.

Moreover, plaintiff was not demoted from Deputy Chief to Captain. At all relevant times, plaintiff had held the position of Captain. There is no Deputy Chief position or classification in the Burbank Police Department. The Chief of Police has been authorized to designate one of his captains to serve an assignment in the capacity of a Deputy Police Chief. Plaintiff, as a captain, served in that assigned capacity from approximately August 2007 until approximately May 2009. The captain serving in the assigned capacity of Deputy Police Chief was tasked with day-to-day oversight of the Department's operations and to train and mentor new Captains. This assignment was created under a previous administration.

In May 2009, Chief of Police Tim Stehr decided to restructure the Police Department. He did not believe that there was a pressing need for the role of the Captain serving in the capacity of Deputy Chief, and Chief Stehr wanted to have more direct control and contact within the Department. Therefore, he eliminated the assignment of having a Captain serve in the capacity of Deputy Police Chief and reassigned plaintiff as the Captain in command of the Investigations Division.

Part of Chief Stehr's decision to restructure was based upon a loss of confidence in plaintiff's ability to fulfill the tasks given to the Captain with the Deputy Chief assignment. The most serious contributing factor was that Chief Stehr had received allegations of impropriety concerning plaintiff, including that plaintiff had improperly interfered in an attempted to influence an internal investigation. As the Captain with the Deputy Chief assignment, plaintiff oversaw internal affairs investigations conducted by the Department, which oversight was not appropriate given the allegations against plaintiff.

(b) Tim Stehr, Mike Flad and members of the City's Management Services

1 Department area aware of plaintiff's failure to complain of alleged race discrimination. The
2 following witnesses were aware of the reasons for the 2009 restructuring of the Police
3 Department: Plaintiff, Chief of Police Tim Stehr and his Command Staff, all members of the
4 Department who received the Chiefs Daily Bulletin on the restructuring, Elizabeth J. Gibbons,
5 City Manager Mike Flad. Also, internal affairs investigators, as well as complaining and other
6 witnesses in internal affairs investigations may have knowledge relevant hereto, however the
7 identity of such persons is privileged and confidential under Penal Code §832.7 and *Evidence*
8 *Code* §1043, particularly to the extent such investigations remains ongoing.

9 (c) The following documents relate to the restructuring: May 14, 2009 and letter from
10 Juli C. Scott to Elizabeth J. Gibbons and documents referred to therein; Burbank Police Daily
11 Bulletin dated May 4, 2009; City of Burbank, Management Services Division, Personnel Action
12 Forms as to plaintiff, 2007 through 2009, and other miscellaneous Human Resources, personnel
13 and payroll documents. Documents gathered or generated during the investigation into alleged
14 improprieties by plaintiff, which is ongoing and as such remains confidential and privileged, will
15 be provided when and if they are discoverable.

16 NINTH AFFIRMATIVE DEFENSE

17 (Manager's Privilege)

18 (a) Plaintiff did not complain about discrimination in the Burbank Police Department
19 to either City Manager Mike Flad or Chief of Police Tim Stehr as alleged in the complaint, or in
20 any other manner of which the City is aware prior to describing such allegations as underlying his
21 FEHA and/or government tort claims for retaliation and in the complaint in this action.

22 Moreover, plaintiff was not demoted from Deputy Chief to Captain. At all relevant times,
23 plaintiff had held the position of Captain. There is no Deputy Chief position or classification in
24 the Burbank Police Department. The Chief of Police has been authorized to designate one of his
25 captains to serve an assignment in the capacity of a Deputy Police Chief. Plaintiff, as a captain,
26 served in that assigned capacity from approximately August 2007 until approximately May 2009.
27 The captain serving in the assigned capacity of Deputy Police Chief was tasked with day-to-day
28 oversight of the Department's operations and to train and mentor new Captains. This assignment

1 was created under a previous administration.

2 In May 2009, Chief of Police Tim Stehr decided to restructure the Police Department. He
3 did not believe that there was a pressing need for the role of the Captain serving in the capacity of
4 Deputy Chief, and Chief Stehr wanted to have more direct control and contact within the
5 Department. Therefore, he eliminated the assignment of having a Captain serve in the capacity of
6 Deputy Police Chief and reassigned plaintiff as the Captain in command of the Investigations
7 Division.

8 Part of Chief Stehr's decision to restructure was based upon a loss of confidence in
9 plaintiff's ability to fulfill the tasks given to the Captain with the Deputy Chief assignment. The
10 most serious contributing factor was that Chief Stehr had received allegations of impropriety
11 concerning plaintiff, including that plaintiff had improperly interfered in an attempted to
12 influence an internal investigation. As the Captain with the Deputy Chief assignment, plaintiff
13 oversaw internal affairs investigations conducted by the Department, which oversight was not
14 appropriate given the allegations against plaintiff.

15 (b) Tim Stehr, Mike Flad and members of the City's Management Services
16 Department area aware of plaintiff's failure to complain of alleged race discrimination. The
17 following witnesses were aware of the reasons for the 2009 restructuring of the Police
18 Department: Plaintiff, Chief of Police Tim Stehr and his Command Staff, all members of the
19 Department who received the Chiefs Daily Bulletin on the restructuring, Elizabeth J. Gibbons,
20 City Manager Mike Flad. Also, internal affairs investigators, as well as complaining and other
21 witnesses in internal affairs investigations may have knowledge relevant hereto, however the
22 identity of such persons is privileged and confidential under *Penal Code* §832.7 and *Evidence*
23 *Code* §1043, particularly to the extent such investigations remains ongoing.

24 (c) The following documents relate to the restructuring: May 14, 2009 and letter from
25 Juli C. Scott to Elizabeth J. Gibbons and documents referred to therein; Burbank Police Daily
26 Bulletin dated May 4, 2009; City of Burbank, Management Services Division, Personnel Action
27 Forms as to plaintiff, 2007 through 2009, and other miscellaneous Human Resources, personnel
28 and payroll documents. Documents gathered or generated during the investigation into alleged

1 improprieties by plaintiff, which is ongoing and as such remains confidential and privileged, will
2 be provided when and if they are discoverable.

3 TENTH AFFIRMATIVE DEFENSE

4 (Lack of Knowledge)

5 (a) Plaintiff did not complain about discrimination in the Burbank Police Department
6 to either City Manager Mike Flad or Chief of Police Tim Stehr as alleged in the complaint, or in
7 any other manner of which the City is aware prior to describing such allegations as underlying his
8 FEHA and/or government tort claims for retaliation and in the complaint in this action.

9 (b) Tim Stehr, Mike Flad and members of the City's Management Services
10 Department area aware of plaintiff's failure to complain of alleged race discrimination.

11 (c) There are no documents relating to plaintiff's non-existent alleged complaints of
12 discrimination.

13 ELEVENTH AFFIRMATIVE DEFENSE

14 (Failure to exhaust)

15 (a) Any of plaintiff's alleged claims which require exhaustion of internal,
16 administrative, or judicial remedies before institution of suit are barred for failure to properly
17 exhaust those internal, administrative, or judicial remedies. Plaintiff failed to bring internal
18 complaints prior to bringing this action. Discovery is continuing.

19 (b-c) City Management Services Division custodian of records. discrimination.

20 TWELFTH AFFIRMATIVE DEFENSE

21 (Failure to mitigate)

22 (a) The City has not yet conducted discovery regarding and therefore currently has no
23 facts to support this affirmative defense. Discovery is continuing.

24 THIRTEENTH AFFIRMATIVE DEFENSE

25 (Laches)

26 (a) Plaintiff did not complain about discrimination in the Burbank Police Department
27 to either City Manager Mike Flad or Chief of Police Tim Stehr as alleged in the complaint, or in
28 any other manner of which the City is aware prior to describing such allegations as underlying his

1 FEHA and/or government tort claims for retaliation and in the complaint in this action.

2 (b) Tim Stehr, Mike Flad and members of the City's Management Services
3 Department area aware of plaintiff's failure to complain of alleged race discrimination.

4 (c) There are no documents relating to plaintiff's non-existent alleged complaints of
5 discrimination.

6 FOURTEENTH AFFIRMATIVE DEFENSE

7 (Unclean Hands)

8 (a) Plaintiff did not complain about discrimination in the Burbank Police Department
9 to either City Manager Mike Flad or Chief of Police Tim Stehr as alleged in the complaint, or in
10 any other manner of which the City is aware prior to describing such allegations as underlying his
11 FEHA and/or government tort claims for retaliation and in the complaint in this action.

12 Moreover, plaintiff was not demoted from Deputy Chief to Captain. At all relevant times,
13 plaintiff had held the position of Captain. There is no Deputy Chief position or classification in
14 the Burbank Police Department. The Chief of Police has been authorized to designate one of his
15 captains to serve an assignment in the capacity of a Deputy Police Chief. Plaintiff, as a captain,
16 served in that assigned capacity from approximately August 2007 until approximately May 2009.
17 The captain serving in the assigned capacity of Deputy Police Chief was tasked with day-to-day
18 oversight of the Department's operations and to train and mentor new Captains. This assignment
19 was created under a previous administration.

20 In May 2009, Chief of Police Tim Stehr decided to restructure the Police Department. He
21 did not believe that there was a pressing need for the role of the Captain serving in the capacity of
22 Deputy Chief, and Chief Stehr wanted to have more direct control and contact within the
23 Department. Therefore, he eliminated the assignment of having a Captain serve in the capacity of
24 Deputy Police Chief and reassigned plaintiff as the Captain in command of the Investigations
25 Division.

26 Part of Chief Stehr's decision to restructure was based upon a loss of confidence in
27 plaintiff's ability to fulfill the tasks given to the Captain with the Deputy Chief assignment. The
28 most serious contributing factor was that Chief Stehr had received allegations of impropriety

1 concerning plaintiff, including that plaintiff had improperly interfered in an attempted to
2 influence an internal investigation. As the Captain with the Deputy Chief assignment, plaintiff
3 oversaw internal affairs investigations conducted by the Department, which oversight was not
4 appropriate given the allegations against plaintiff.

5 (b) Tim Stehr, Mike Flad and members of the City's Management Services
6 Department area aware of plaintiff's failure to complain of alleged race discrimination. The
7 following witnesses were aware of the reasons for the 2009 restructuring of the Police
8 Department: Plaintiff, Chief of Police Tim Stehr and his Command Staff, all members of the
9 Department who received the Chief's Daily Bulletin on the restructuring, Elizabeth J. Gibbons,
10 City Manager Mike Flad. Also, internal affairs investigators, as well as complaining and other
11 witnesses in internal affairs investigations may have knowledge relevant hereto, however the
12 identity of such persons is privileged and confidential under Penal Code §832.7 and *Evidence*
13 *Code* §1043, particularly to the extent such investigations remains ongoing.

14 (c) The following documents relate to the restructuring: May 14, 2009 and letter from
15 Juli C. Scott to Elizabeth J. Gibbons and documents referred to therein; Burbank Police Daily
16 Bulletin dated May 4, 2009; City of Burbank, Management Services Division, Personnel Action
17 Forms as to plaintiff, 2007 through 2009, and other miscellaneous Human Resources, personnel
18 and payroll documents. Documents gathered or generated during the investigation into alleged
19 improprieties by plaintiff, which is ongoing and as such remains confidential and privileged, will
20 be provided when and if they are discoverable.

21 FIFTEENTH AFFIRMATIVE DEFENSE

22 (Estoppel)

23 (a) Plaintiff did not complain about discrimination in the Burbank Police Department
24 to either City Manager Mike Flad or Chief of Police Tim Stehr as alleged in the complaint, or in
25 any other manner of which the City is aware prior to describing such allegations as underlying his
26 FEHA and/or government tort claims for retaliation and in the complaint in this action.

27 Moreover, plaintiff was not demoted from Deputy Chief to Captain. At all relevant times,
28 plaintiff had held the position of Captain. There is no Deputy Chief position or classification in

the Burbank Police Department. The Chief of Police has been authorized to designate one of his captains to serve an assignment in the capacity of a Deputy Police Chief. Plaintiff, as a captain, served in that assigned capacity from approximately August 2007 until approximately May 2009. The captain serving in the assigned capacity of Deputy Police Chief was tasked with day-to-day oversight of the Department's operations and to train and mentor new Captains. This assignment was created under a previous administration.

In May 2009, Chief of Police Tim Stehr decided to restructure the Police Department. He did not believe that there was a pressing need for the role of the Captain serving in the capacity of Deputy Chief, and Chief Stehr wanted to have more direct control and contact within the Department. Therefore, he eliminated the assignment of having a Captain serve in the capacity of Deputy Police Chief and reassigned plaintiff as the Captain in command of the Investigations Division.

Part of Chief Stehr's decision to restructure was based upon a loss of confidence in plaintiff's ability to fulfill the tasks given to the Captain with the Deputy Chief assignment. The most serious contributing factor was that Chief Stehr had received allegations of impropriety concerning plaintiff, including that plaintiff had improperly interfered in an attempted to influence an internal investigation. As the Captain with the Deputy Chief assignment, plaintiff oversaw internal affairs investigations conducted by the Department, which oversight was not appropriate given the allegations against plaintiff.

(b) Tim Stehr, Mike Flad and members of the City's Management Services Department area aware of plaintiff's failure to complain of alleged race discrimination. The following witnesses were aware of the reasons for the 2009 restructuring of the Police Department: Plaintiff, Chief of Police Tim Stehr and his Command Staff, all members of the Department who received the Chief's Daily Bulletin on the restructuring, Elizabeth J. Gibbons, City Manager Mike Flad. Also, internal affairs investigators, as well as complaining and other witnesses in internal affairs investigations may have knowledge relevant hereto, however the identity of such persons is privileged and confidential under Penal Code §832.7 and *Evidence Code* §1043, particularly to the extent such investigations remains ongoing.

(c) The following documents relate to the restructuring: May 14, 2009 and letter from Juli C. Scott to Elizabeth J. Gibbons and documents referred to therein; Burbank Police Daily Bulletin dated May 4, 2009; City of Burbank, Management Services Division, Personnel Action Forms as to plaintiff, 2007 through 2009, and other miscellaneous Human Resources, personnel and payroll documents. Documents gathered or generated during the investigation into alleged improprieties by plaintiff, which is ongoing and as such remains confidential and privileged, will be provided when and if they are discoverable.

SIXTEENTH AFFIRMATIVE DEFENSE

(Res Judicata and Collateral Estoppel)

(a) The City currently has no facts to support this affirmative defense. Discovery is continuing.

SEVENTEENTH AFFIRMATIVE DEFENSE

(After-Acquired Evidence)

(a)-(c) Any facts, witnesses, or documents pertaining to this defense are part of an ongoing internal investigation which is protected under Penal Code §832.7 and *Evidence Code* §1043.

EIGHTEENTH AFFIRMATIVE DEFENSE

(Statute of Limitations)

(a) Some or all of plaintiff's claims are barred by the applicable statute of limitations, California Code of Civil Procedure §335.1 and California Government Code §§ 911.2, 12960, 12965. Some of the actions/events raised in pleadings in this action occurred more than one year before plaintiff filed his DFEH Charge and government tort claim. Discovery is continuing.

NINETEENTH AFFIRMATIVE DEFENSE

(Privilege and Immunities)

This is a legal claim made in defense to certain kinds of causes of action.

TWENTIETH AFFIRMATIVE DEFENSE

(Additional Defenses)

This is a legal reservation of rights for further defenses as they become apparent.

1 Discovery is continuing. (Emphasis added.)

2 **REASON WHY FURTHER RESPONSE SHOULD BE COMPELLED:**

3 It is clear from defendant's response that defendant relies upon "witness information and
4 documents gathered or generated during the investigation into alleged improprieties by plaintiff"
5 in regard to the alleged reasons for its demotion of plaintiff from Deputy Chief to Captain.
6 Indeed, defendant claims that the "the most serious contributing factor" relied upon by defendant
7 in demoting plaintiff was the alleged improprieties of plaintiff which are the subject of these
8 alleged confidential investigations. Defendant cannot have its cake and eat it too. Plaintiff is
9 entitled to be apprised by defendant under oath of all facts, witnesses, and documents that
10 defendant claims allegedly support its contentions in this matter so that plaintiff may rebut same
11 and demonstrate that such alleged reasons are false, pretextual, and a sham, and that the real
12 reason for the demotion and other adverse employment actions taken against plaintiff was
13 retaliation by defendant for plaintiff engaging in activities protected by Labor Code Section
14 1102.5 and FEHA.

15 Plaintiff contends that none of the requested information and documents are confidential
16 and protected from discovery, under Penal Code §832.7, *Evidence Code* §1043, the attorney-
17 client privilege, the attorney work-product doctrine, or any other privilege. Plaintiff hereby
18 incorporates by reference all of the authorities and argument regarding the relevance,
19 discoverability, and reasons why such information and documents are not privileged as set forth
20 above in regard to Form Interrogatory No. 201.3 as though set forth here in extenso.

21 **REASON WHY FURTHER RESPONSE SHOULD BE COMPELLED:**

22 **A. Plaintiff Failed To Meet And Confer**

23 Plaintiff's meet and confer letter only requested the City to meet and confer as to "Form
24 Interrogatories 201.3 et seq." [Pelletier Decl., ¶ 4, Ex. A, p. 1.] While City would concede that
25 the reference to "Form Interrogatories No. 201.3 et seq." would be sufficient to raise form
26 interrogatory No. 201.4 for meet and confer purposes, it did not address or raise Form
27 Interrogatory, 216.1, a much more vast and wide ranging interrogatory that is in a different
28 section of the judicial council form.

Both CCP §§ 2030.300(b) requires that a motion to compel a further response to a request for production of documents "shall" be accompanied by a meet and confer declaration pursuant to CCP § 2016.040. That section provides that a meet and confer declaration must show a good faith attempt to resolve "each issue presented by the motion." Some effort to informally meet and confer is required in all instances. *Clement v. Alegre* (2009) 177 Cal.App.4th 1277, 1294. Where there was no attempt to meet and confer about a discovery request at issue, the Court may deny a motion to compel. *Townsend, supra*, 61 Cal.App.4th at 1439 (denying motion to compel deposition questions). Since plaintiff never attempted to meet and confer about this request for production of documents, the Court should decline to compel any further response thereon.

B. The City Will Amend Its Response In Light Of The Completion Of The Pending 2009 IA Investigation

This discovery request asked for information that was the subject of a then-pending internal investigation. The City accordingly and appropriately declined to provide this information until the investigation was complete. The objection to producing/providing information from an on-going investigation was both well taken and appropriate, particularly in the absence of a motion for such information under *Evidence Code* § 1043.

Evidence Code § 1043 is the exclusive method for obtaining not just police officer personnel records, but also the information from such records. *Davis v. City of Sacramento* (1994) 24 Cal.App.4th 393, 401, fn. 2 (citing *Hackett v. Sup. Ct.* (1993) 13 Cal.App.4th 96, 99). It would serve no purpose if such privileged information could be obtained by other means, such as by written or oral questioning of the officers or department. *Id.* In addition, ongoing police investigations and all of the information contained therein, are subject to their own layer of confidentiality. *County of Orange v. Sup. Ct.* (2000) 79 Cal.App.4th 759, 765. *County of Orange* relied extensively upon *Williams v. Superior Court* (1993) 5 Cal.4th 337, 355, in which the California Supreme Court held that a Sheriff Department's internal disciplinary investigation was protected from disclosure under the Public Records Act while pending, and beyond. Assessing that holding, the *County of Orange* court held that notwithstanding that the Public Records Act does not apply to civil discovery, its express exemption of police investigative files (as noted in a

1 case involving an internal disciplinary investigation) “reinforces the view that such files are
2 confidential in nature.” *County of Orange, supra*, 79 Cal.App.4th at 765.

3 As indicated in defense counsel’s April 2, 2010 letter, in light of the completion of the
4 internal investigation and its provision to plaintiff as part of the disciplinary process, the City has
5 agreed to provide amended responses to plaintiff’s discovery requests, including the discovery
6 responses at issue herein. [Pelletier Decl., ¶ 7, Ex. C.] The City is in the process of preparing and
7 will serve these responses on or before the date of the hearing on plaintiff’s Motion. [Id.] As
8 such, the Motion, as a motion to compel, should be considered moot as to items 1-n in the Notice
9 of Motion.

10 **C. In Fact, Further Documents Have Already Been Produced**

11 In fact, however, The City has already provided plaintiff and his counsel with the
12 documentation of the now completed 2009 IA Investigation of him as part of an administrative
13 process. [Varner Decl., ¶ 5.] This has provided plaintiff with the information requested in the
14 Notice of Motion subsections a (no. 2), b, d, f, g, h, and i. Plaintiff’s counsel may attempt to
15 obfuscate the issue by claiming that such production was incomplete. However, such production
16 included the complete report of the 2009 IA Investigation as to plaintiff and the underlying
17 information uncovered in the investigation of plaintiff. [Varner Decl., ¶¶ 5-6.] The City also
18 produced the records of the underlying 2008 IA investigation, No. 4-26-08-1, item no. c in the
19 Notice of Motion. [Id.] The only other material in the City’s possession would be documents
20 from investigations of other BPD officers in the 2009 IA Investigation that were not part of or
21 used in the investigation of plaintiff. As discussed in the opposition, that information was not
22 requested in this Motion, nor was a proper showing made therefore. Nor is that information
23 related to this discovery request about information pertaining to the purported “demotion” of
24 plaintiff. Accordingly, the Motion should be denied as moot as to all records of the 2008 IA
25 Investigation and 2009 IA Investigation which have already been provided to plaintiff.

26 ///

27 ///

28 ///

1 For all of the above reasons, no further responses should be compelled.
2

3 Dated: April 8, 2010

Burke, Williams & Sorensen, LLP

4
5 By: 

6 Robert J. Tyson
7 Attorneys for Defendant
8 City of Burbank
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

- 1
- 2
- 3
- 4
- 5
- 6
- 7
- 8
- 9
- 10
- 11
- 12
- 13
- 14
- 15
- 16
- 17
- 18
- 19
- 20
- 21
- 22
- 23
- 24
- 25
- 26
- 27
- 28

**DEFENDANT CITY OF BURBANK'S OPPOSING SEPARATE
STATEMENT OF FORM INTERROGATORIES AND
RESPONSES IN PLAINTIFF'S MOTION TO COMPEL**

Gregory W. Smith, Esq.
Law Offices of Gregory W. Smith
6300 Canoga Ave., Suite 1590
Woodland Hill, CA 91367

Following ordinary business practices, the envelope was sealed and placed for collection by Federal Express on this date, and would, in the ordinary course of business, be retrieved by Federal Express for overnight delivery on this date.

Executed on April 8, 2010, at Los Angeles, California.

Alice Cheung